APPEAL NO. 92088
FILED APRIL 21, 1992

On January 22, 1992, a contested case hearing was held at _____, Texas, (hearing officer) presiding as hearing officer. He determined that the claimant was injured within the course and scope of her employment and was entitled to additional benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Carrier urges that some of the findings and conclusions of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Carrier further complains that the hearing officer discussed the evidence in the context of an issue not before the contested case hearing and, we conclude his position to be, this resulted in an erroneous determination. There is no appeal concerning the issue of an injury occurring within the course and scope of employment.

DECISION

Being unable to conclude that the hearing officer based his decision on a correct application of the law, we reverse and remand.

Briefly, the claimant injured her back on _____, when she picked up a heavy box of computer component parts. The carrier is the workers' compensation carrier for the employer and the claimant was on assignment to (company). The claimant immediately told her supervisor about her injury and was taken to the office where she was released to go home. The next day she went to the emergency room of a hospital for an examination. At the time, she was pregnant and was experiencing bleeding, which resulted in a miscarriage a couple of days later. The diagnosis regarding her back was "acute musculoskeletal low back pain."

The claimant later received treatment from (chiropractic clinic) for acute sprain and strain from March 7, 1991, through July 12, 1991. Claimant was taken off work by chiropractic clinic on March 7, 1991, and received temporary income benefits (TIBS) until July 26, 1991. TIBS were stopped by the carrier because chiropractic clinic issued a document on "7-16-91" stating that the carrier had sufficiently recovered to be able to return to her regular work. A document entitled "To the File of [claimant]" dated July 30, 1991, from chiropractic clinic contained the following remarks:

> [Claimant] was taken off work on 3-7-91. She was planned to return to full work status on 7-16-91, however [claimant] released herself - against the advice of her doctor - from care after her 7-12-91 visit.

It goes on to state:

> As a point of information, this report was written to the best of my ability using [Dr. S's] notes, records and x-rays. I started treating this patient on 7-8-91.

The claimant obtained a job at a (store) and earned $185.00 during August, 1991. She was terminated from store for absenteeism which she stated resulted from "female problems - I had my right tube swollen up bad." She stated her "back pain would come and go--but mostly it was still there--I didn't do any lifting."

On January 2, 1992, Dr. K, of the (specialty clinic) evaluated the claimant as having cervical strain and right lumbar radiculopathy (disease of the nerve roots) in the right lower back. The claimant was advised to continue "conservative management" and the comment made that following an EMG and a CAT scan, the claimant would be a good candidate for a work hardening program.

At the outset, we note the hearing officer states in his discussion of the evidence that there is no evidence to show that the carrier contested compensability until after expiration of 60 days and, therefore had waived its rights to contest compensability. We observe that the issue of compensability was considered as an issue at all stages of the dispute resolution process, was never objected to as having been waived by the carrier, and indeed, was litigated at the contested case hearing by both parties. Under those circumstances, predicating a determination of course and scope on the application of waiver under Article 8308-5.21(a) was not appropriate. *See* Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991; Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992. However, the evidence was sufficient to support a determination that the injury was incurred in the course and scope of employment and the controversion issue was not raised in the carrier's request for review.

The findings of fact and conclusion of law with which the carrier takes exception are:

FINDINGS OF FACT

5.One hundred and four weeks have not elapsed since _____.

6.Claimant's disability continues to exist.

7.There has been no certification that the Claimant has reached maximum medical improvement.

* * * * *

CONCLUSIONS OF LAW

2.The Claimant is entitled to continue to receive benefits under the Workers' Compensation Act as a result of her injury on _____.

The issues before the contested case hearing, clearly set out on the record and

agreed to by the parties were: (1) was the claimant injured in the course and scope of employment of _____; (2) is the claimant entitled to be paid additional TIBS. It is the resolution of the second issue that causes us to reverse and remand.

As we have previously held, the entitlement to TIBS or the continuation of TIBS requires disability. If there is no disability, as defined in Article 8308-1.03(16), or if disability ceases, then there is respectively no entitlement to TIBS or such entitlement stops. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. *See also* Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. Here, there was probative evidence, as set out above, that disability ceased on July 16, 1991, when the claimant's doctor signed the return to regular work. Further evidence on this matter is the claimant's going to work for a different employer and the absence of any affirmative revocations of the doctor's return to work statement. Evidence that disability either continued or began again at some time may be garnered from the carrier's testimony that her back pain would come and go, the suggestion that her doctor may have been modifying or back-tracking on his return to work statement and the January 2, 1992, report of Dr. K.

As indicated above, the hearing officer found, in his somewhat conclusory finding, that the claimant's disability "continues to exist." While we have repeatedly recognized that the hearing officer is the fact finder, is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given it, and has the authority and responsibility to resolve conflicts in and between the evidence (Texas Workers' Compensation Commission Appeal No. 92069, decided April 1,1992; Texas Workers' Compensation Commission Appeal No. 91102, decided January 22, 1992), we cannot conclude that the hearing officer utilized appropriate standards or applied the law correctly in deciding this case.

In his discussion of the evidence, the hearing office states that Article 8308-4.23(b) provides that TIBS continue until the employee has reached maximum medical improvement (MMI). While this is a true statement, it overlooks the first part of that article which provides that an employee <u>who has disability</u> (emphasis ours) and who has not attained MMI is entitled to TIBS. Unfortunately, the complete discussion by the hearing office on the second issue focused exclusively on what was required to determine MMI and concluded "[t]here is no evidence in the record that anyone ever made a determination that the claimant has reached [MMI] or that the carrier invoked the procedures" set forth in Commission rules. Following this discussion, the hearing officer entered Findings of Fact 5 and 7, as set out above.

Under the setting of this case, these findings are in no way dispositive of the issue before the contested case hearing, *i.e.*, whether there was entitlement to additional TIBS. The entering of such findings by the hearing officer clearly indicate to us that the course taken to arrive at his decision was erroneous. Our decisions have attempted to lay to rest the notion that disability or continued disability are inextricably tied to MMI. Appeal 91045,

supra; Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991; Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. In Appeal 91014, we stated that a release to normal duties is not the equivalent of a determination of MMI, a determination which would stop TIBS. The focus in that case was not on the issue of disability and the need for having disability to be entitled to TIBS quite apart from the matter of the passage of 104 weeks or reaching MMI.

Although we have held that, in the proper set of circumstances, unnecessary findings may be appropriately disregarded (Texas Workers' Compensation Commission Appeal No. 91109, decided January 21, 1992), we can not resort to that ruling in this case where it is apparent that an erroneous standard and/or application of the law likely occurred. This is buttressed by the state of the evidence as discussed above.

Inasmuch as the decision appears to be on the wrong footing, we are compelled to reverse and remand for further consideration, not inconsistent with this opinion, and, if deemed necessary by the hearing officer, development of evidence.

The decision is reversed and the case remanded for an expedited hearing.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge